

Before the  
Administrative Hearing Commission  
State of Missouri



DALE C. STALDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-1959 AF
	)	
MISSOURI BOARD OF PHARMACY,	)	
	)	
Respondent.	)	

**DECISION**

We grant petitioner Dale C. Stalder's ("Stalder") attorney fees and costs.

**Procedure**

On November 16, 2009, the Missouri Board of Pharmacy ("the Board") filed a complaint seeking to discipline Stalder. Terry C. Allen ("Allen") represented Stalder throughout that case and Assistant Attorney General Edwin Frownfelter represented the Board. After hearing, we found that there was no cause for the Board to discipline Stalder's license.

On September 29, 2011, Stalder filed an application for attorney fees. We held a hearing on January 5, 2012. Allen represented Stalder. Assistant Attorney General Daryl Hylton represented the Board. The matter became ready for our decision on July 19, 2012.

## Evidentiary Rulings

During the hearing in this case, the Board presented two documents, marked as Exhibits K and L, as evidence. Stalder testified that he wrote the document identified as Exhibit K because the Board's counsel suggested that he write a letter to the Board in order to discuss a settlement. Exhibit L is a settlement offer dated May 28, 2010, sent to the Board by Stalder's attorney. Stalder objected to the admission of both of these exhibits because they were settlement offers. The parties agreed that Exhibit L was a settlement offer. We took the objections under advisement in order to see if there was testimony about the proffered documents.

Although we “are not required to follow the ‘technical rules of evidence,’ the ‘fundamental rules of evidence’ applicable to civil cases also are applicable in ... administrative hearings.”<sup>1</sup> The relaxation of the “technical rules of evidence” allows “leading questions and other informalities” but does not “abrogate the fundamental rules of evidence.”<sup>2</sup>

“Because settlements are encouraged under the law, the general rule is that evidence procured from settlement is to be excluded at trial.”<sup>3</sup> The only exception to this rule is when a settlement offer contains an independent fact relevant to an issue between the parties.<sup>4</sup> That exception “is a very narrow one, requiring unusual facts to permit its application.”<sup>5</sup>

We find that Exhibit L is unquestionably a settlement offer. It contains specific terms of a proposed settlement. It is inadmissible. Exhibit K is a more difficult issue. That exhibit does not explicitly state that it is a settlement offer. However, Stalder's testimony, which was uncontroverted and which we credit, was that Exhibit K was part of his negotiation with the

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<sup>1</sup> *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 155 (Mo. 2003).

<sup>2</sup> *Id.*, quoting *State ex rel. De Weese v. Morris*, 359 Mo. 194, 221 S.W.2d 206, 209 (1949).

<sup>3</sup> *Hancock v. Shook*, 100 S.W.3d 786, 799 (Mo. banc 2003); *Ullrich v. CADCO, Inc.*, 244 S.W.3d 772, 780 (Mo. App. E.D. 2008).

<sup>4</sup> *Ullrich*, 244 S.W.3d at 780.

<sup>5</sup> *J.A. Tobin Const. Co. v. State Highway Comm'n*, 697 S.W.2d 183, 188 (Mo.App. W.D. 1985).

Board's attorney for a lesser punishment. We conclude that Exhibit K is inadmissible because it was part of a settlement offer.

### **Findings of Fact**

#### Findings of fact from the underlying action

1. Stalder is licensed as a pharmacist. His license was current and active during the events described.
2. In December of 2006, Stalder was employed as the pharmacist in charge of James Marsh's ("Marsh") Sun Fresh Pharmacy ("Sun Fresh") at 4001 Mill Street, Kansas City, Missouri, 64111.
3. Sun Fresh was owned by Marsh.
4. On December 9, 2006, Marsh received an unsolicited fax from Secure Telemedicine Pharmacy Network ("STM"). The fax invited independent pharmacies to join a network in which STM would send patients' prescriptions to the pharmacy.
5. Marsh presented the fax to Stalder for his review. Stalder had questions about what was contained in the fax and felt it needed to be researched.
6. Stalder attempted to contact the Board about the proposed arrangement. Each time he called, Stalder was unable to speak with anyone representing the Board, and no one from the Board ever returned a call.
7. Before executing the contract with STM, Stalder consulted the requirements of the Board, the Missouri Bureau of Narcotics and Dangerous Drugs ("BNDD"), and the United States Drug Enforcement Administration ("DEA").
8. At Marsh's direction, Stalder contacted Mario Wilthew, a representative of STM.
9. Wilthew e-mailed Stalder a further explanation of the system and a contract.

10. Stalder also received a drug list from STM, which he checked to determine if the prices were reasonable.

11. STM's drug list included controlled substances and medications that were not controlled substances. Based on the information from Wilthew, Stalder anticipated that the prescriptions referred by STM would not be limited to controlled substances.

12. On February 23, 2007, Sun Fresh entered into a contract with STM. Stalder signed the contract on behalf of Sun Fresh.

13. Under the contract, Sun Fresh filled prescriptions from doctors participating in STM's program. Sun Fresh obtained access to the prescriptions through STM's internet Web site, which permitted an electronic image of the signed prescriptions to be viewed and printed by Sun Fresh. For each prescription filled, STM paid Sun Fresh a \$10 fulfillment fee plus a prescription price representing a 20% markup over the cost of the medication to Sun Fresh. The prescriptions were sent by Sun Fresh to the patients through FedEx. STM was responsible for the FedEx shipping costs.

14. Between March 6, 2007, and April 6, 2007, Sun Fresh filled a total of 107 prescriptions referred by STM. Stalder filled 97 prescriptions, and his relief pharmacist, Khanh Nguyen, filled another 10 prescriptions.

15. All of the prescriptions were written for Missouri residents.

16. Each of the prescriptions was signed by a doctor.

17. Stalder or Nguyen printed a copy of each prescription upon filling it and kept a copy for their records.

18. Each prescription contained the prescribing doctor's signature and certification of the following:

I hereby certify to U.S. Telemedical Solutions LLC and any of its partners that the prescriptions issued by me were all issued based upon a valid practitioner-patient relationship, a documented patient evaluation, including history and physical examination information adequate in my medical judgment to confirm the diagnosis for which any drug was prescribed. I have kept a copy of all medical records relating to such patients as required by my state of licensure.

19. Of the 107 prescriptions filled by Sun Fresh, 102 were for Schedule III or Schedule IV controlled substances. None of the controlled-substance prescriptions were refills, and none of the controlled-substance prescriptions permitted refills without doctor authorization.

20. Of those 107 prescriptions, 102 were written by Dr. Brian W. Weaver. Weaver affirmed on the prescriptions that the conditions required by the Board, BNDD, and DEA were met for filling the prescriptions.

21. Weaver was a Missouri licensed physician who maintained a business address in Sikeston, Missouri, from January 2001 to January 2006. In 2007, Weaver maintained a business address in Atlanta, Georgia.

22. Stalder called and talked with Weaver on several occasions. The telephone number Stalder called to reach Weaver was a Missouri telephone number. Stalder initially called Weaver to familiarize himself with the doctor and his prescribing practices. Subsequent calls were made when necessary to fill prescriptions.

23. Stalder did not know how many medical offices Weaver had or of the location of any offices other than the office in Atlanta, Georgia, which was Weaver's mailing address. Stalder did not know any other doctors with offices in places as far apart as Weaver's.

24. Tansyla Keels-Nicholson, M.D., whose office address was in Henderson, Colorado, wrote three of the prescriptions referred by STM System and filled by Sun Fresh. Keels-Nicholson is not licensed in Missouri.

25. Upon receipt of the first prescription written by Keels-Nicholson, Stalder called her to confirm she intended for him to dispense the prescription referred by STM. Keels-Nicholson confirmed that she intended the prescriptions to be filled. During a subsequent call with Keels-Nicholson, Stalder learned that Keels-Nicholson was filling in for Weaver.

26. Louis M. Fernandez, M.D, whose office address was in Chicago, Illinois, wrote two of the prescriptions referred by STM and filled by Sun Fresh. Fernandez is not licensed in Missouri.

27. Stalder spoke on multiple occasions to Weaver and Keels-Nicholson, but he never spoke with Fernandez. Stalder attempted to reach Fernandez by telephone on two occasions and left messages that were never returned.

28. Stalder also talked with patients whose prescriptions were referred by STM as necessary to fill the prescriptions or correct an error.

29. On four occasions, Stalder filled prescriptions for Hydrocodone / APAP<sup>6</sup> with Mallinckrodt brand Hydrocodone / APAP when the prescription referenced Watson brand. Both Watson and Mallinckrodt are manufacturers of generic Hydrocodone / APAP. Stalder discussed the substitution of one generic brand for another generic brand with Weaver, the prescribing doctor. The prescriptions were as follows:

- a. Rx C171418 filled on 3/7/2007. Prescription was for “Hydrocodone / APAP / (7.5/750 mg) 90 Tablets Generic Vicodin ES” and the first line of the comments section of the prescription states “[t]ake one tablet every 6 hours P.R.N. for pain watson brand.”<sup>7</sup>
- b. Rx C171453 filled on 3/8/2007: Prescription was for “Hydrocodone / APAP / (10/500 mg) 90 Tablets Generic Lortab 10” and the first line of the comments section to the prescription states “[t]ake one tablet every 6 hours P.R.N. for pain please give Watson brand.”<sup>8</sup>

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<sup>6</sup>Acetaminophen.

<sup>7</sup>Ex. B, at F6.

<sup>8</sup>*Id.* at F10.

- c. Rx C171492 filled on 3/9/2007: Prescription was for “Hydrocodone / APAP / (10/500 mg) 120 Tablets Generic Lortab” and the first line of the comments section of the prescription states “[t]ake one tablet every 6 hours P.R.N. for pain watson brand.”<sup>9</sup>
- d. Rx C171615 filled on 3/16/2007: Prescription was for “Hydrocodone / APAP / (10/500mg) 90 Tablets Generic Lortab 10” and the first line of comments section of the prescription states “[t]ake one tablet every 6 hours P.R.N. for pain watson brand.”<sup>10</sup>

30. On March 15, 2007, Stalder filled a prescription for 60 tablets of Ambien, a Schedule IV controlled substance. Before filling the prescription, Stalder called the prescribing doctor to verify the prescription because the agreement Stalder had with STM was that prescriptions were not to be filled beyond a 30-day supply. The prescribing doctor stated he would check with STM. After confirming with STM, the doctor informed Stalder that STM permitted his patient to receive a 60-day supply because STM classified the patient as Type A. The prescribing doctor confirmed to Stalder that he wanted the patient to receive the full 60-day supply as he had prescribed. The doctor explained to Stalder that patients authorized by STM to receive 60-day supplies are identifiable by the “Type A” appearing on prescriptions for those patients.

31. On March 20, 2007, Stalder made an error in filling Prescription Rx C171693. The prescription was for 7.5/500 mg tablets of Hydrocodone/APAP, but Stalder filled the prescription with 7.5/750 mg tablets of Hydrocodone/APAP. The error was discovered by the Board's investigator, who reported it to Stalder in approximately October 2007. The Board requested a corrective letter from Stalder. He provided the letter and the Board accepted it.

32. After noticing that almost all of the prescriptions received from STM were for controlled substances, Stalder contacted the Board for advice. In doing so, Stalder acted consistently with the requirements of the Board, BNDD, and DEA. Before Stalder could contact

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<sup>9</sup>*Id.* at F22.

<sup>10</sup>Ex. B at F47.

the doctors who wrote the prescriptions for further verification whether needed or not, the DEA instructed Stalder not to contact the doctors, particularly Weaver. Stalder complied.

33. After meeting with Investigator Frank Van Fleet and discussing the arrangement, Stalder notified STM on April 9, 2007, that he was canceling the arrangement and would not fill any more prescriptions. Van Fleet had recommended that Stalder immediately cancel the contract with STM, and Stalder did so.

34. At all relevant times, Stalder was a salaried employee of Sun Fresh and did not receive any extra money or benefit from filling the electronic prescriptions referred by STM. During its investigation, the Board did not contact any of the doctors or patients whose prescriptions were filled by Sun Fresh under the STM contract. The Board also did not examine any records maintained by the prescribing doctors concerning the patients whose prescriptions were filled by Sun Fresh under the STM contract.

#### Facts related to this petition

35. At the time the underlying complaint was filed against Stalder, his net worth did not exceed two million dollars.

36. Terry Allen (“Allen”) represented Stalder during the entirety of the underlying action and this petition.

37. Allen worked 176.92 hours on both of these cases.

38. Stalder had \$499.50 in legal costs.

### **Conclusions of Law**

Section 536.087.1<sup>11</sup> states:

A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless

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<sup>11</sup>Statutory references are to RSMo 2000 unless otherwise noted.

the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

### **A. Agency Proceeding/Contested Case**

An agency proceeding is “an adversary proceeding in a contested case pursuant to this chapter in which the state is represented by counsel[.]”<sup>12</sup> A “contested case” is “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.”<sup>13</sup> The relevant inquiry is not whether the agency actually held an “adversary proceeding in a contested case,” but whether a statute, ordinance, or constitutional provision required the agency to do so.<sup>14</sup>

The “State” is “the state of Missouri, its officers and its agencies.”<sup>15</sup> The Board is a state agency. The underlying case was one that the Board brought to establish cause to discipline Stalder. Section 621.045 requires that we determine such a case after an adversary hearing. An assistant attorney general represented the Board in the underlying case. Therefore, the underlying case was a contested case and an agency proceeding.

### **B. Prevailing Party**

Section 536.085(2) defines a “party” to include:

(a) An individual whose net worth did not exceed two million dollars at the time the civil action or agency proceeding was initiated[.]

Stalder’s net worth at the time that the Board filed the underlying complaint was within the amount that allows him to be a party in a fee proceeding.

Section 536.085(3) defines “prevails” as: “obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding[.]” In the underlying complaint, the Board

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<sup>12</sup>Section 536.085(1).

<sup>13</sup>Section 536.010(4).

<sup>14</sup>*Lipic v. State*, 93 S.W.3d 839, 841 (Mo. App. E.D. 2002).

<sup>15</sup>Section 536.085(5).

asked that we find cause for discipline against Stalder. We decided that Stalder was not subject to discipline. Clearly, Stalder prevailed.

On the issue of whether Stalder “obtained” the favorable result, the Court of Appeals has defined “obtained,” as used in § 536.085(3), as: “‘Obtain,’ in its simplest form, means ‘to get possession of ... to arrive at; to reach; to achieve...’”<sup>16</sup> When the favorable result comes after the prevailing party has actively contested the agency’s action, the prevailing party has “obtained” the favorable decision.<sup>17</sup>

Stalder hired counsel and actively contested the Board's complaint at the hearing. Stalder obtained the favorable result and qualifies as a prevailing party.

### **C. Substantially Justified**

A prevailing party is entitled to an award of attorney fees and expenses unless we determine that (1) the State’s position was substantially justified or (2) special circumstances make an award unjust.<sup>18</sup> The Board argues no “special circumstances” that would make an award of attorney fees unjust, and we find none. Therefore, attorney fees and expenses are to be awarded unless the State’s position was substantially justified. Stalder’s fee application contends that the Board was not substantially justified.

Section 536.087.3 provides in part:

The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made,

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<sup>16</sup>*Melahn v. Otto*, 836 S.W.2d 525, 529 (Mo.App, W.D. 1992), *quoting* Webster's Dictionary of the English Language, Unabridged 1236 (Encyclopedia Ed. 1977).

<sup>17</sup>*Id.*

<sup>18</sup>Section 536.087.1.

provided that any such hearing shall be limited to consideration of matters which affected the agency's decision leading to the position at issue in the fee application.

The Board must present a *prima facie* case that it had a reasonable basis in both fact and law for its position and that this basis was not merely marginally reasonable, but clearly reasonable, although not necessarily correct.<sup>19</sup> The Board must bear its burden based on the facts previously found in the underlying case and the additional information shown at the attorney fee hearing as to matters that led to its decision to file a complaint against Stalder. We must take into consideration not just the facts as determined in the underlying case, but also how these facts reasonably may have appeared to the Board.<sup>20</sup>

We find that the Board's positions were not substantially justified. We will discuss each of the Board's allegations against Stalder in turn.

**1. § 338.055.2(15)**

The Board contended that Stalder violated the drug laws and rules of the United States and the State of Missouri.

**a. § 195.060.1 and .5**

At the time relevant to the Board's complaint, § 195.060.1 and .5 provided:

1. [A] pharmacist, in good faith, may sell and dispense controlled substances to any person only upon a prescription of a practitioner as authorized by statute . . . . All written prescriptions shall be signed by the person prescribing the same. All prescriptions shall be dated on the day when issued and bearing the full name and address of the patient for whom . . . the drug is prescribed, and the full name, address, and the registry number under the federal controlled substances laws of the person prescribing, if he is required by those laws to be so registered. . . .

\* \* \*

5. Except where a bona fide physician-patient-pharmacist relationship exists, prescriptions for narcotics or hallucinogenic drugs shall not be delivered to or for an ultimate user or agent by mail or other common carrier.

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<sup>19</sup>*Dishman v. Joseph*, 14 S.W.3d 709, 716-19 (Mo.App. W.D. 2000); *Joseph v. Dishman*, 81 S.W.3d 147, 153 (Mo.App. W.D. 2002).

<sup>20</sup>*Dishman*, 14 S.W.3d at 716, 718-19.

The Board asserted that Stalder violated § 195.060.1 because the prescriptions for controlled substances he filled were not actually signed by the prescriber. As we found in the original case, each of the prescriptions was signed. The Board's argument in the original case was that the signatures were identical and could not have been made by a human being using a pencil or pen. The only evidence that the Board provided in the original hearing was testimony by the Board's investigator, who was not a handwriting expert, that the signatures were applied by a machine. The Board has presented no new evidence that the prescriber did not sign the prescriptions or that the Board had any other factual knowledge about how the signatures were made.

The Board appears to have proceeded on this claim based on its supposition that the signatures were not made by a physician. The Board did not review the original prescriptions or contact the prescribing doctor. The Board did not investigate how the prescriptions were created. Instead, the Board proceeded upon a review of photocopied printouts from the Internet. We conclude that the Board lacked a reasonable factual basis for this claim under § 195.060.1.

We also conclude that the Board lacked a reasonable factual basis for its claim under § 195.060.5. Each filled prescription contained a representation from the prescribing doctor that the prescriptions were issued based upon a valid physician-patient relationship. In his calls to both patients and the prescribing doctors, Stalder did not uncover any facts challenging the validity of those physician-patient relationships. The Board has not put forward any evidence, either in the original hearing or the hearing in this case, showing that the Board had a reasonable factual basis, as opposed to supposition, for believing that the physician-patient relationships were invalid.

**b. 21 C.F.R. § 1306.04(a)**

Regulation 21 C.F.R. § 1306.04(a) provides:

A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

The Board contended in the initial action, and again contends now, that Stalder violated this provision because the prescriptions “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”

We reiterate that Board has produced no evidence—as opposed to supposition—that the prescriptions were not issued by a physician in the usual course of his medical practice. This claim lacks a factual foundation.

**c. 21 C.F.R. § 1306.05(a)**

Regulation 21 C.F.R. § 1306.05(a), at the time relevant to the Board’s complaint, provided:

All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use and the name, address and registration number of the practitioner.

\* \* \*

A practitioner may sign a prescription in the same manner as he would sign a check or legal document (e.g., J.H. Smith or John H. Smith). Where an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescriptions may be prepared by the secretary or agent for the signature of a practitioner, but the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist, including a pharmacist employed by a central

fill pharmacy, who fills a prescription not prepared in the form prescribed by DEA regulations.

As discussed previously, there is no evidence that the doctors did not sign the prescriptions. Further, an oral order was permitted for all of the controlled substances,<sup>21</sup> and such oral orders did not require that the prescription be written with “ink or indelible pencil.” The Board has not shown that it had substantial justification for raising this claim.

**2. § 338.055.2(6)**

The Board contended that Stalder violated regulations established by the Board. We find no substantial justification for these claims.

**a. Regulation 19 CSR 30-1.062(2)**

The Board argued that Stalder violated 19 CSR 30-1.062(2) because he did not reduce the prescriptions to writing, because the prescriptions did not meet the requirements of § 195.060, and because Stalder failed to verify the validity of the prescriptions with the prescribing doctors. We rejected all of those arguments in the previous case.

We find that the Board lacked a substantial justification for these arguments. The prescriptions were written and transmitted via computer. Stalder kept a printed copy of each prescription as part of his records. As we previously found, the prescriptions met the requirements of § 195.060. There is no requirement under Regulation 19 CSR 30-1.062(2) for Stalder to verify the prescriptions. Thus, there was no substantial justification for the Board to raise this claim.

**b. Regulation 20 CSR 2220-2.020(11)**

The Board contended that Stalder violated 20 CSR 2220-2.020(11) because he dispensed prescriptions when he knew or should have known that there was no patient-doctor relationship.

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<sup>21</sup> 21 C.F.R. § 1306.21(a).

We found in the original case that the prescriptions were facially valid and that the doctor represented on each prescription that there was a valid doctor-patient relationship. Stalder spoke with the doctors and patients and did not learn any facts that caused him to doubt that there was a valid doctor-patient relationship. The Board has presented no evidence in this case that there was not a valid doctor-patient relationship or that the Board had any evidence, other than supposition, on which to base its decision to bring this claim. We thus conclude that there was no substantial justification to raise this claim.

**c. Regulations 20 CSR 2220-2.090(2)(E), (F), (N), (W), and (Y)**

Regulation 20 CSR 2220-2.090(2)(E), (F), (N), (W), and (Y) provides:

The responsibilities of a pharmacist-in-charge, at a minimum, will include:

\* \* \*

(E) Assurance that all procedures of the pharmacy in the handling, dispensing and recordkeeping of controlled substances are in compliance with state and federal laws;

(F) Any excessive or suspicious requests, or both, for the dispensing of controlled substances be verified prior to dispensing;

\* \* \*

(N) The pharmacist-in-charge will be responsible for the supervision of all pharmacy personnel, to assure full compliance with the pharmacy laws of Missouri;

\* \* \*

(W) Assure full compliance with all state and federal drug laws and rules;

\* \* \*

(Y) Assure that all state and federal laws concerning drug distribution and control are complied with and that no violations occur that would cause a drug or device or any component thereof to become adulterated or misbranded[.]

As discussed above, we find that the Board had no substantial justification to proceed with claims that Stalder violated state and federal laws and regulations. We therefore find that the Board has no substantial justification to raise claims under 20 CSR 2220.2.090(2)(E), (N), (W), and (Y). We also find that there was no substantial justification to pursue discipline under (F) because the prescriptions were not “excessive and suspicious.” Each prescription was made out for a separate patient at a separate address. If a pharmacist had to verify each prescription under

these circumstances, every pharmacist in this State would have to verify every prescription they fill.

### **3. Incompetency, Misconduct, and Gross Negligence**

The Board contended in the previous case that there was cause to discipline Stalder's license under § 338.055.2(5) for incompetence, misconduct, and gross negligence. We found that there was not cause to discipline Stalder under this section. We now find that the Board lacked substantial justification to bring this claim.

Incompetency is a "state of being" demonstrating that a professional is unable or unwilling to function properly in the profession.<sup>22</sup> Misconduct is intentional wrongdoing<sup>23</sup> and represents a "'transgression, dereliction, unlawful or wrongful behavior, or impropriety that is willful in nature.'"<sup>24</sup> Gross negligence is an act or course of conduct constituting such a gross deviation from the standard of care a reasonable professional would exercise under the circumstances that it demonstrates a conscious indifference to a professional duty.<sup>25</sup>

As we have previously stated, Stalder properly filled the prescriptions at issue. Each prescription was valid on its face and complied with state and federal law. The Board has presented no evidence that the prescriptions were not signed or authorized by a physician or that there was no patient-physician relationship with regard to any of the prescriptions. The Board therefore has not shown that Stalder was incompetent, that there was any misconduct, or that there was gross negligence. We cannot find, based on the record before us, any reason to believe

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<sup>22</sup>293 S.W.3d 423 (Mo. 2009).

<sup>23</sup>*Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App. E.D. 1988).

<sup>24</sup>*Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 900 (Mo. App. W.D. 2001), *quoting In re Conard*, 944 S.W.2d 191, 201 (Mo. 1997).

<sup>25</sup>*See Tendai v. Missouri Bd. of Regis'n for the Healing Arts*, 161 S.W.3d 358, 367-368 (Mo. 2005), *rev'd on other grounds*; *Albanna v. State Bd. of Regis'n for the Healing Arts*, 293 S.W.3d 423 (Mo. 2009); and *Duncan v. Missouri Bd. for Arch'ts, Prof'l Engineers & Land Surveyors*, 744 S.W.2d 524, 533 (Mo. App. E.D. 1988).

that the Board had substantial justification for its claim that Stalder was subject to discipline under § 338.055.2(5).

The Board also argued that Stalder was subject to discipline under § 338.055.2(5) by substituting one brand of generic drug for another brand of generic drug. The Board has failed to identify any statute, rule, regulation, or standard of care for pharmacists that prohibits substituting one generic brand for another generic brand. Stalder documented the substitutions in his records and contacted the prescribing doctor and the representative of STM to inform them that mentioning a generic brand in a prescription is unnecessary and could lead to confusion. There was no substantial justification for raising this claim.

Next, the Board argued that Stalder committed misconduct, gross negligence, or incompetency because he erred in filling one prescription. The prescription called for hydrocodone/APAP 7.5/500 mg and Stalder filled the prescription with hydrocodone/APAP 7.5/750 mg. The patient therefore received an extra 250 milligrams of APAP (acetaminophen) with each dose. The Board has presented no evidence that the conduct was willful and therefore failed to present substantial justification that Stalder committed misconduct. Incompetency is not based on a single incident or a series of incidents, but “is a state of being,” showing that a professional is unable or unwilling to function properly in the profession.<sup>26</sup> The one incident complained of here cannot show incompetency, and the Board lacked substantial justification to raise this portion of the claim. We also find that there was no substantial justification to allege gross negligence. The error here was in giving the patient an extra dosage of Tylenol (equivalent to one standard Tylenol pill) with each dose of hydrocodone. The Board has failed to provide any evidence demonstrating that this practice was dangerous or that it was a “gross deviation” from a regular pharmacist’s standard of care.

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<sup>26</sup> *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 436 (Mo. 2009).

Finally, the Board argued that Stalder was subject to discipline under § 338.055.2(5) for filling a 60-day supply of Ambien after consulting with the prescribing physician and verifying the prescription. The Board has produced no legal authority restricting the length of a prescription for Ambien. The Board also has produced no authority showing incompetence, misconduct, or gross negligence when a pharmacist fills a prescription after verifying the prescription with the physician. We find that there was absolutely no basis in fact or law for the Board to raise this claim.

**4. § 338.055.2(13)**

The Board argued that Stalder's actions constituted a violation of professional trust or confidence under § 338.055.2(13). The Board identified the same conduct addressed in connection with § 338.055.2(5), (6) and (15). We have found that there was no substantial justification for those claims. We find that there is no substantial justification for this claim either.

**D. The amount of attorney fees**

Section 536.087.1 requires that Stalder "shall be awarded those reasonable fees and expenses incurred by that party in the ... agency proceeding[.]" Section 536.085(4) provides:

(4) "**Reasonable fees and expenses**" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

In his application, Stalder requests an award of \$30,961.00 for attorney fees, which represents 176.92 hours at \$175.00 per hour, as well as costs in the amount of \$499.50.

Section 536.085(4) caps the hourly rate at \$75.00 per hour unless Stalder can show a “special factor.” Stalder argues that he is entitled to a higher rate because “this was a complex complicated case,” because there was a limited amount of attorneys who could handle the case, and because no attorney would represent Stalder in this case for \$75.00 per hour.

Stalder’s argument that no attorney would represent him for \$75.00 does not, by itself, constitute a special factor.<sup>27</sup> We also find that Stalder’s argument that other local attorneys charged more than Allen does not constitute a special factor. In analyzing a similar federal statute, the United States Supreme Court stated:

If “the limited availability of qualified attorneys for the proceedings involved” meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the \$75 cap—since the “prevailing market rates for the kind and quality of the services furnished” are obviously *determined* by the relative supply of that kind and quality of services. “Limited availability” so interpreted would not be a “special factor,” but a factor virtually always present when services with a market rate of more than \$75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city—or even in the entire country—come to exceed \$75 per hour ..., then that market-minimum rate will govern instead of the statutory cap.<sup>[28]</sup>

We agree with the Court’s reasoning. Accepting Stalder’s argument would mean that every case before us would exceed the \$75.00 cap. We are not free to set aside the text of § 536.085(4) to reach that conclusion.

Further, we find that the issues in this case were typical administrative law issues. The Supreme Court stated:

[T]he exception for “limited availability of qualified attorneys for the proceedings involved” must refer to attorneys ... having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all

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<sup>27</sup> *Sprenger v. Missouri Dept. of Public Safety*, 340 S.W.3d 109, 113 (Mo.App. W.D. 2010).

<sup>28</sup> *Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988).

litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.<sup>29</sup>

Although Allen has much experience in administrative law and is a capable advocate, we are not persuaded that his skills rise to the level of a special factor in this case.

Allen worked 176.92 hours on Stalder's case. At \$75.00 per hour, the total fee is \$13,269.00. Stalder is also entitled to costs of \$499.50. The total award due Stalder is \$13,768.50.

### **Conclusion**

Stalder is entitled to an award of attorney fees and reasonable expenses because he is the prevailing party in the underlying case and the Board failed to prove that its position was substantially justified. Stalder is entitled to \$13,768.50 in fees and costs.

SO ORDERED on May 13, 2013.

\s\ Nimrod T. Chapel, Jr.  
NIMROD T. CHAPEL, JR.  
Commissioner

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<sup>29</sup> 487 U.S. 552 at 572.